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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TOBY MARTIN SLATER,

Defendant and Appellant.

H025857

(Monterey County

Super. Ct. No. SS012510)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on September 10, 2004, be modified as follows:

On page 19, delete the last sentence of second full paragraph beginning with the words “Moreover, the failure” and ending with the citation “(*People v. Jenkins* (1994) 29 Cal.App.4th 287, 298).”

On page 20, line 4 of the first partial paragraph, delete the last two sentences beginning with the words “Moreover, in light of the jury’s” and ending with the words “no unanimity instruction was required” and insert in place of the deleted sentences the following:

Defendant argues that the prosecutor did not make an election in this case, since, the prosecutor had argued in closing that Karen heard two threats. However, defendant

does not quote the relevant portion of the prosecutor's argument in its entirety. On this issue, the prosecutor argued: "She heard a threat, namely that she was going to be killed if she left him, and then she heard two threats actually, one before he left and then one when he came back which was accompanied with the pointing of the handgun at her. She told you she thought he meant it. She thought it was going to happen. Now, I don't have to prove that Mr. Slater actually intended to pull the trigger or to kill her or to harm her, just that he intended that she understand the threat and believe it was going to happen." When read in context, the prosecutor's argument, like the information, reflects her election to prosecute the second threat, the one that involved the gun. She merely mentioned the other threat as an aside. Thus, we find no error in failing to give a unanimity instruction.

Moreover, even if we were to find error, any error was harmless. In *People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562, this court acknowledged that "[t]here is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction." Some cases apply the "harmless beyond a reasonable doubt" standard under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); other cases apply the standard from *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), which is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (See e.g., *People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299 [applying *Watson*]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [applying *Chapman*].) In *Vargas*, this court held, "*Watson* provides the correct standard on the issue." (*Vargas, supra*, 91 Cal.App.4th at p. 562.) In light of the jury's true finding on the gun enhancement on the conviction for making a criminal threat, it is not reasonably probable that there was any disagreement by the jury regarding the factual basis for the conviction. For the same reason, any error was harmless even under the *Chapman* standard of harmless error beyond a reasonable doubt.

On page 34, delete the citation at the end of the second full paragraph, “(*People v. Watson* (1956) 46 Cal.2d 818, 836)” and replace it with:

(*Watson, supra*, 46 Cal.2d at p. 836.)

There is no change in the judgment.

The petition for rehearing is denied.

McAdams, J.

Bamattre-Manoukian, Acting P.J.

Mihara, J.